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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1965.

## No. 593

KOEHRING COMPANY,
*Petitioner,*

VS.

HYDE CONSTRUCTION COMPANY, INC.,
*Respondent,*

AND

KOEHRING COMPANY,
*Petitioner,*

VS.

VARDAMAN S. DUNN,
*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT.

**PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND**

**BRIEF IN SUPPORT OF PETITION AND MOTION**

DAVID H. SANDERS
205 Denver Building
Tulsa, Oklahoma
*Attorney for Vardaman S. Dunn*

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
*Attorney for Hyde Construction Company, Inc.*

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, HArrison 1-3030

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IN THE

# SUPREME COURT OF THE UNITED STATES

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| KOEHRING COMPANY, *Petitioner,* vs. HYDE CONSTRUCTION COMPANY, INC., ET AL., *Respondents.* | No. 593 |

## RESPONDENTS' PETITION FOR REHEARING AND MOTION TO AMEND ORDER OF REMAND

Respondents, Hyde Construction Company, Inc. and Vardaman S. Dunn, respectfully petition the Court for rehearing of the decision and judgment in this cause and move the Court to amend the order remanding the case to the District Court for the Northern District of Oklahoma, to the end that the case may be remanded to the Court of Appeals for the Tenth Circuit for completion by that Court of its appellate review processes in the light of this Court's decision and judgment, and for grounds state the following:

1.

The only issue decided by the Court of Appeals was the transfer-jurisdictional issue, and this single threshold issue was the sole issue involved in the question presented to and decided by this Court on the writ of certiorari.

2.

Several additional points were specified, briefed and argued in the Court of Appeals, presenting serious issues

vitally affecting or dispositive of the case under review. Such issues were not reached or decided by the Court of Appeals, but were pretermitted by that Court in view of its ruling on the threshold jurisdictional decision.

3.

The Court of Appeals has not completed its appellate function of reviewing the judgment of the District Court on the basis of the record and the points specified, briefed and argued before that Court, and the review process cannot be completed if the Court of Appeals is by-passed by remanding the case to the District Court, except upon a subsequent appeal attended by unnecessary expense and delay.

WHEREFORE, Respondents respectfully pray that they be afforded a re-hearing for the purpose of presenting the grounds outlined above, and Respondents respectfully move the Court to amend its order or mandate to the extent of directing that the cause be remanded to the Court of Appeals for the Tenth Circuit for further proceedings and appellate review in that Court, and in support hereof Respondents submit the sub-joined brief.

## BRIEF IN SUPPORT OF PETITION AND MOTION

### PRELIMINARY STATEMENT

Under date of January 17, 1966, this Court granted a petition for writ of certiorari filed by the Koehring Company, and reversed the judgment of the Court of Appeals for the Tenth Circuit and directed that the case be remanded to the District Court for the Northern District of Oklahoma for further proceedings consistent with this Court's opinion. The Court of Appeals had reversed a judgment of the District Court on the stated ground that the District Court had acted prior to the transfer to it of jurisdiction over the parties and subject matter. The single question presented on the petition for writ of certiorari was the validity of the jurisdictional determination, which in turn depended upon the timing of an order transferring the principal controversy from the District Court in Mississippi to the District Court in Oklahoma. Both the petition for certiorari and the decision of this Court on the petition were also limited to the single question thus presented, and this Court determined that the view of the Court of Appeals on the jurisdictional issue was erroneous and that jurisdiction had been transferred to the District Court at the time that Court acted.

Respondents do not attempt by this petition and motion to have the Court re-hear or reconsider its decision upon the jurisdictional point involved. Our single point is that since the decision of the Court of Appeals on transfer jurisdiction is to be reversed, the case should be remanded to the Court of Appeals instead of to the District Court, in order that the Court of Appeals may, in the light of this Court's threshold ruling, complete its appellate review as to the several points specified in that Court and upon which the merits of the decision of the Trial Court were debated.

## ARGUMENT

### I.

### Serious Appellate Issues Are Now Properly Presented for Decision and Remain Undecided by the Court of Appeals

In its opinion,[1] the Court of Appeals observed that "As argued by the parties, this case presents a myriad of complex issues, particularly the jurisdiction of a district court to determine its own jurisdiction and the power of a federal court to enjoin a state court action under exceptions to 28 U.S.C. § 2283.[2] See 348 F.2d at p. 647. The probable existence of serious questions, yet undecided, was noted in the opening paragraph of Justice Black's dissenting opinion.

Since the Court of Appeals decided that the judgment was void for want of jurisdiction, it concluded that other contentions were not properly before it and no decision was made thereon. Those contentions of the Koehring Company contrary to the jurisdictional issue were found to be without merit. This leaves the "myriad of complex issues" undecided and squarely presented for decision after this Court's reversal.

The "complex issues" have not been resolved except for the one threshold issue involving the question of the transfer jurisdiction of the District Court. A reference to the petition of the Koehring Company for writ of certiorari at page 3 will demonstrate that the single question presented to the Court on the petition was likewise limited

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1. *Hyde Construction Company, Inc.* v. *Koehring Company,* (C.A. 10th, 1965) 348 F.2d 643.

2. Other issues involved are hereinafter noted.

to the transfer-jurisdictional question, and accordingly this was the only issue considered by this Court on the petition, and the only issue that was decided by this Court upon the granting of the petition.

Since the jurisdictional issue lay at the threshold of judicial review, the Court of Appeals elected to halt its judicial review at the threshold of its consideration of the case as a whole by what proves now to have been an erroneous concept of the timing of the transfer of jurisdiction to the Oklahoma District Court.

Some of the points specified, briefed and argued in the Court of Appeals may be summarized as follows:

I. The restraining order issued by the District Court was ineffective because: (A) The cause of action in which the Court acted had been dismissed by Hyde's Notice of Dismissal in conformity with Rule 41(a)(1) of the Federal Rules of Civil Procedure; (B) At the time of the entry thereof, the Lower Court had not been invested with jurisdiction of the cause of action by any proper transfer; and (C) Koehring made no prima facie showing by petition or otherwise to establish an exception to 28 U.S.C.A. 2283.

II. Even if the District Court was vested with jurisdiction and power to issue the restraining order, the order was erroneously issued and therefore cannot support the relief granted to a private litigant in a proceeding in *civil contempt*. The right to remedial relief falls with a restraining order which events prove was erroneously issued.[3] The restraining order was erroneously issued since the State

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3. *United States* v. *United Mine Workers*, 330 U.S. 258, 67 S.Ct. 677; *Salvage Process Corporation* v. *Acme Tank Cleaning Process Corporation*, (C.A. 2d) 86 F.2d 727; *Cliett* v. *Hammons*, (C.A. 5th) 305 F.2d 565.

Court had concurrent jurisdiction and the independent right to proceed to judgment.[4]

III. One of the sanctions imposed by the order of the District Court in civil contempt was to enjoin execution and collection of the State Court judgment, and this novel sanction amounted to a denial of full faith and credit to the judgment of the State Court contrary to law.

The only decision was on Point I (B), as outlined above. A decision favorable to Appellants upon any one of the remaining points would have been equally dispositive of the judgment imposing sanctions in *civil contempt.* These are serious points. Our position upon each is well supported by the authorities generally and by decisions of this Court. Our brief in the Court of Appeals covered thirty-five pages, with the citation of numerous authorities. Only two pages were devoted to the transfer jurisdiction point, I (B) above.

The record on the petition for certiorari in this case required only a review and decision upon the one threshold jurisdictional issue and, in fact, the record here did not attempt to present the remaining appellate issues. So, in accord with its customary practice, this Court did quite appropriately "avoid rendering a decision beyond the obvious requirements of the record." Cf. *Barr* v. *Matteo,* 355

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4. Certainly the 10th Circuit, by abstaining from deciding other points presented by the appellants before it, did not and could not have intended to reject such authoritative decisions of this court as *Kline* v. *Burke Construction Co.,* 260 U.S. 226, 43 S.Ct. 79, 24 A.L.R. 1007, *Princess Lida of Thurn and Taxis* v. *Thompson,* 305 U.S. 456, 59 S.Ct. 275, and *Penn General Casualty Co.* v. *Commonwealth of Pennsylvania,* 294 U.S. 189, 55 S.Ct. 386, or its own prior decisions precisely in point, such as: *Skelly Oil Co.* v. *Phillips Petroleum Co.,* (C.A. 10th) 174 F.2d 89, *Wells* v. *Helm,* (C.A. 10th) 105 F.2d 402, and *Denver-Greeley Valley Water Users Assn.* v. *McNeil,* (C.A. 10th) 131 F.2d 67.

U.S. 171, 78 S.Ct. 204. We do not ask this Court to pass upon those important questions which were before the Court of Appeals and which remain unresolved by that Court. We would not conceive this to be appropriate or in conformity with precedent or established appellate practice, or the statutory scheme designed to relieve the litigation load of this Court by providing for appellate functions in the Courts of Appeal.

## II.

### The Case Should Be Remanded to the Court of Appeals

A remand to the *District Court* can settle none of the questions presented to the Court of Appeals which remain undecided. Therefore, the remand, we submit, should be to the Court of Appeals for completion of its review function. This has been the course consistently taken in the past where the decision of a Court of Appeals has been against the claim of jurisdiction in the District Court, and where other questions are left undecided because of such threshold determination.

*Mitchell* v. *Robert De Mario Jewelry, Inc.*, (1960) 361 U.S. 288, 80 S.Ct. 332, was an action by the Secretary of Labor to enjoin violations of the Fair Labor Standards Act forbidding discrimination against and discharge of an employee for institution proceedings under the Act. The District Court ordered reinstatement of the discharged employees but refused to order reimbursement for loss of wages on the assumed lack of jurisdiction so to do. The Court of Appeals for the Fifth Circuit affirmed on the jurisdictional point, and therefore did not reach or decide the question of an alleged abuse of discretion in failing to order reimbursement. The Supreme Court reversed, but in so doing remanded the case to the Court of Appeals, concluding as follows:

". . . The Court of Appeals did not reach the question whether the District Court abused its discretion in declining to order reimbursement. While, because of what we have found to be the statutory purposes there is doubtless little room for the exercise of discretion not to order reimbursement, since we do not have the entire record before us we shall remand the case to the Court of Appeals for consideration of that issue."

*United States* v. *Beach,* (1945) 324 U.S. 193, 65 S.Ct. 602, was a criminal case involving the Mann Act. The Court of Appeals reversed a judgment of conviction on the single ground that the Act was inapplicable to transportation of a female taking place wholly within the District of Columbia. The Supreme Court reversed and remanded to the Court of Appeals, saying:

"As the Court of Appeals did not pass upon other grounds for reversal urged by respondent, the case is remanded to it for further proceedings not inconsistent with this opinion. Bates v. United States, 323 U.S. 15, 17, 65 S.Ct. 15, 16, and cases cited."

In *Bates* v. *United States,* (1944) 323 U.S. 15, 65 S.Ct. 15, another criminal case, the Court reversed and remanded to the Court of Appeals, saying:

". . . We do not consider the merits of the Government's contention that the conviction can be sustained on other grounds, since, in the circumstances of this case, we deem it more appropriate that the Court of Appeals consider that question in the first instance. . . ."

In *Buzynski* v. *Luckenbach S. S. Co., Inc.,* (1928) 277 U.S. 226, 48 S.Ct. 440, the Court reversed the Court of Appeals and remanded to that Court. The Court said:

"The view of the Circuit Court of Appeals that the Contracting Company would not be liable for the negligence of a fellow servant, was erroneous, and its

> judgment must be reversed. But since it did not determine whether the accident was in fact due to such negligence, or to some other cause, the case will be remanded to that court with instructions to determine this question and take further proceedings in conformity with this opinion. See Cole v. Ralph, 252 U.S. 286, 290, 40 S.Ct. 321, 64 L.Ed. 567; Gerdes v. Lustgarten, 266 U.S. 321, 327, 45 S.Ct. 107, 69 L.Ed. 309."

In *Cole* v. *Ralph*, (1920) 252 U.S. 286, 40 S.Ct. 321, the Court said that it might deal only with the matter considered by the Court of Appeals or "remand the case to it for any needed action upon other questions, or proceed ourselves to a complete decision." The Court in this case took the latter action as preferable in the particular case "inasmuch as counsel have united in presenting to us all questions thought to arise upon the record," etc.[5]

The circumstances under which a case will be remanded to a Court of Appeals or to a District Court are rather clearly set forth in *Gerdes* v. *Lustgarten*, (1924) 266 U.S. 321, 45 S.Ct. 107. This case involved a question of a right to a discharge in bankruptcy because of the issuance of a false financial statement. Neither the District Court nor the Court of Appeals decided the question of fact which was found by the Supreme Court to be controlling and in this situation the Court commented as follows:

> "The question then arises as to what disposition we should now make of the case. The material questions of fact in reference to the financial statement, upon which the decision must ultimately depend, have

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5. In the case at bar, neither the record presented nor the briefs submitted nor the hearing afforded the parties include any issue save the transfer-jurisdictional issue. Furthermore, this Court has not elected the course of "complete decision", but has limited itself to consideration and determination of the one jurisdictional issue thus presented.

not as yet been determined in the courts below. They were not decided by the referee who heard the testimony; they were apparently assumed by the District Court; and they were not passed upon by the Circuit Court of Appeals on account of its ruling in reference to the lapse of time. We may now either determine these questions upon an independent examination of the testimony, or remand the case for further proceedings in order that they may be determined in the lower courts. Cole v. Ralph, 252 U.S. 286, 290, 40 S.Ct. 321, 64 L.Ed. 567. If they had been specifically decided by the District Court and only the Circuit Court of Appeals had failed to pass upon them, an appropriate course would be to remand the case to the Circuit Court of Appeals. Lutcher Lumber Co. v. Knight, 217 U.S. 257, 268, 30 S.Ct. 505, 54 L.Ed. 757; Brown v. Fletcher, 237 U.S. 583, 588, 35 S.Ct. 750, 59 L.Ed. 1128. But since they were not expressly decided by the District Court, we conclude that, under all the circumstances, we should take the course adopted in Marconi Wireless Co. v. Simon, 246 U.S. 46, 57, 38 S.Ct. 272, 62 L.Ed. 568, that is, reverse the decrees in both the courts below and remand the case to the District Court. If it be determined that the financial statement was materially false and that the Bank made the loans in reliance upon it, the discharge should be denied, otherwise it should be granted."

In other words, when the Court of Appeals has completed its appellate function insofar as it can do so on the record as made in the District Court and the next essential step is the determination of some fact or issue by the District Court, a remand to the Court of Appeals serves no useful purpose and the cause goes directly back to the District Court. On the other hand, when there remains for decision in the Court of Appeals one or more questions or issues which may affect or be dispositive of the case, the remand is to that Court so that it may complete its appellate work and fully discharge its duty

and responsibility of intermediate review. The case at bar presents the latter situation.

In *United States* v. *Wrightwood Dairy Co.*, (1942) 315 U.S. 110, 62 S.Ct. 523, the Court said:

> "The judgment will be reversed, but as errors assigned below have not been passed on there or argued here, the cause will be remanded to the Circuit Court of Appeals for further proceedings in conformity with this opinion. The mandate will issue forthwith."

In cases involving threshold issues of jurisdiction or the right to maintain an action where the District Court is reversed by the Court of Appeals for lack of jurisdiction, without passing upon other questions raised on appeal, this Court, on reversal of the Court of Appeals, has invariably remanded to that Court instead of to the trial or District Court.

Several of the earlier cases were reviewed and approved in *Brown* v. *Fletcher*, (1915) 237 U.S. 583, 35 S.Ct. 750. In this case, the Court of Appeals was found to have erroneously concluded that the trial court lacked diversity jurisdiction. On certiorari, this Court declined to pass upon other questions and held that the proper procedure was to remand to the Court of Appeals. The Court said:

> "Indeed, the views just stated have been applied by previous rulings. Lutcher & M. Lumber Co. v. Knight, 217 U.S. 257, 54 L.ed. 757, 30 Sup. Ct. Rep. 505; United States v. Rimer, 220 U.S. 547, 55 L.ed. 578, 31 Sup. Ct. Rep. 596; William Cramp & Sons Ship & Engine Bldg. Co. v. International Curtis Marine Turbine Co., 228 U.S. 645, 57 L.ed. 1003, 33 Sup. Ct. Rep. 722. In the Lutcher Case, which was brought here by the allowance of a writ of certiorari, it was found

that the court below, the circuit court of appeals of the fifth circuit, had from a mistake of law refused to consider the merits of the case, and although it was recognized that, as the result of the certiorari, the whole case was open to our review, it was yet pointed out that as, by the provisions of the act of 1891 [26 Stat. at L. 826, chap. 517], the cause was one which, apart from certiorari, was within the competency of the circuit court of appeals, and its judgment, when rendered, would be final, the duty of this court was not to determine the case on the merits, but, after correcting the error which had stood in the way of the court below performing its duty, to remand the case to that court so that such duty might be discharged. So in the Rimer Case which was brought here by certiorari—when it was discovered that the writ had obviously been allowed upon a mistaken conception as to the existence in the case of a far-reaching question of public importance justifying the issue of the writ, it was pointed out that, the mistake becoming apparent, it was our duty not to decide the case, but to remand it to the circuit court of appeals, to which the certiorari had been directed, to enable that court to discharge its duty. And the same principle was involved in the Cramp Case, where, after the case had been brought to this court by certiorari, and it was held that the decision of the court below was void because the court which decided it was not legally organized, while it was recognized that there was power under the certiorari to dispose of the whole case, it was held that the duty arose, in order to give effect to the statute, not to decide but to remand the case so that when the court below was organized conformably to the statute, the case might be considered and disposed of as the statute contemplated it should be.

"While it follows from these considerations that the decree below must be reversed, it also results that it is our duty to remand the case to the court below that is, the Circuit Court of Appeals, to the end

that, all questions concerning its jurisdiction as a Federal court having been determined by the prior decision of this court, it proceed to discharge its duty of hearing and deciding the case conformably to law.

"Reversed and remanded for further proceedings consistent with this opinion."

In *Fischer* v. *American United Life Ins. Co.*, (1941) 314 U.S. 549, 62 S.Ct. 380, the District Court assumed jurisdiction over a controversy against the contention that the action was in rem and exclusively within the State Court jurisdiction under a precedently filed action involving the same subject matter. There was an appeal from the final decree on the merits which also raised the jurisdictional issue. The Court of Appeals held that the District Court had no jurisdiction and therefore did not pass on the remaining appellate issues. This Court reversed and remanded the case to the Court of Appeals, concluding:

"We express no opinion on the merits of the controversy. Nor do we pass on the contention that Ladew v. Tennessee Copper Co., 218 U.S. 357, 31 S.Ct. 81, 54 L.ed. 1069, prevents the entry of an in personam judgment in the circumstances of this case. For the sole question passed upon by the court below was the power and propriety of the action of the District Court in taking jurisdiction of the cause under § 57 of the Judicial Code."

ALSO

"Whether the scope of the decree entered by the District Court was proper we do not decide. We only hold that the District Court had jurisdiction to resolve the controversy under § 57 of the Judicial Code. The Circuit Court of Appeals should have decided what rights under Iowa law Iowa and its receiver had to the securities and the collections thereon

and whether the decree entered by the District Court was kept within the appropriate limits. Since the Circuit Court of Appeals did not decide those questions, we reverse its judgment and remand the cause to it for further proceedings in conformity with this opinion. It is so ordered."

See also: *Swanson* v. *Traer*, (1957) 354 U.S. 114, 77 S.Ct. 1116.

In *Grant* v. *A. B. Leach & Co.*, (1930) 280 U.S. 351, 50 S.Ct. 107, the Court of Appeals, on appeal from a decree for a corporate receiver for recovery of corporate assets, reversed and dismissed the cause on the ground that the receiver was without authority to sue. The Supreme Court reversed and remanded to the Court of Appeals. The Court said:

"As the view of the Circuit Court of Appeals that the Receiver was without authority to bring the action against Leach & Co. was erroneous, its judgment must be reversed. And since it did not determine the merits of the Receiver's claim, the case will be remanded to that court with instructions to proceed to that end in conformity with this opinion. See Buzynski v. Luckenbach S. S. Co., 277 U.S. 226, 228, 48 S.Ct. 440, 441, 72 L.ed. 860, and cases cited."

## CONCLUSION

This case has a long history in the Chancery and Supreme Courts of Mississippi and in the Federal District Court in Mississippi and in the Court of Appeals for the Fifth Circuit and in the Federal District Court in Oklahoma and in the Court of Appeals for the Tenth Circuit. The circumstances are many and varied, and in some respects quite novel. The record made in these Lower Courts has not been presented to the Court on the petition for

certiorari, and we shall ask this Court to take our word for the fact that there is much in this case that has not met and could not meet the eye of this Court. These circumstances are within the view and grasp of the Court of Appeals for the Tenth Circuit, which has received briefs and heard arguments of the parties on the "myriad of complex issues" involved. We respectfully submit that the Court of Appeals should be afforded the opportunity to first determine what questions remain open for decision in the light of the jurisdictional reversal and to reach and announce its decision upon the several serious points involved in this case in the full light of the entire record before that Court, and that the parties should not be put to the added expense and delay of a subsequent appeal presenting the same points after remand to the District Court for the Northern District of Oklahoma, and this is especially so since any further proceedings which might be conducted in the District Court would be without the guidance of an appellate decision upon the fundamental aspects of the law as applied to the peculiar and particular circumstances involved.

In conclusion, for what it may be worth, we digress from the narrow point here presented to assure this Court, as we have assured the Courts below, that Respondents did not proceed in the State Courts in "disregard" for the order of the Oklahoma District Court, but rather proceeded in regard for prior and subsequent State Court orders to proceed with the case on a determination by that Court that any further delay would result in extreme injustice and hardship on the litigating parties. And we can further assure the Court that the record in this cause on review will reflect that it was the Koehring Company's representatives who first proceeded in disregard of a precedent State Court mandatory order. In short, we beseech this Court to regard the rights of these Respondents without discoloration by

the attempt of the Koehring Company to have Respondents' actions prejudged as contemptuous without consideration of all of the facts and circumstances established on the record.

Respectfully submitted,

DAVID H. SANDERS
205 Denver Building
Tulsa, Oklahoma
*Attorney for Vardaman S. Dunn*

CHARLES CLARK
1741 Deposit Guaranty Bank Building
Jackson, Mississippi
*Attorney for Hyde Construction Company, Inc.*

JANUARY, 1966

**CERTIFICATE OF GOOD FAITH**

The undersigned, of counsel for Respondents, certifies that the foregoing petition and motion is presented in good faith and not for delay.

.....

CHARLES CLARK
*Of Counsel for Respondents*

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